GENTING SANYEN INDUSTRIAL PAPER SDN BHD

v.

WWL CORRUGATORS SDN BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[COMPANIES WINDING-UP NO: 28-58-98]
25 AUGUST 1999

COMPANY LAW: *Winding-up - Petition - Presumption of insolvency - Opposition to petition - Good reasons given - Whether petitioner to prove special circumstances to warrant winding-up - Overriding discretion of court - Whether just and equitable to wind up company - Sections 218 & 221 Companies Act 1965*

COMPANY LAW: *Winding-up - Petition - Opposition to petition - Affidavit in opposition by receiver and manager under debenture - Whether receiver and manager agent of company or creditor - Effect thereof*

The petitioner presented a petition to wind up the respondent company after due notice was given under s. 218 of the Companies Act 1965 ('the Act') on the ground that the company was unable to pay its debts and it would therefore be just and equitable that it be wound up. Two months later, BSN Commercial Bank Bhd ('the bank'), a major creditor of the company, exercised its rights under a debenture executed with the company and appointed a receiver and manager who acted as agent of the company.

Counsel for the petitioner submitted that under s. 218(2) of the Act, a presumption of insolvency arose and, unless rebutted, a winding-up order should be made. The company opposed the winding-up through an affidavit filed by the receiver and manager arguing that there could be no benefit to the petitioner, an unsecured creditor, to persist in seeking the order since the bank being secured, would take the first bite in any realisation, whereas with a receiver and manager, the bank's security could be better realised as a going concern. Counsel for the company argued that the court had an overriding discretion to dismiss or alternatively suspend the petition until the receivership was proved to be not beneficial to all creditors or was uplifted. It was further argued that as good reasons had been given for opposing the petition, it was for the petitioner to show special circumstances to warrant the making of a winding-up order.

Held:

[1] The discretion of the court is influenced by where the opposition is coming from, who the opposer is, whether he is a secured or unsecured creditor, whether he belongs to a class and if so whether he represents the majority or minority view. Where the company is insolvent, the foremost consideration is the interest of the creditors, and this prevails over the interest of other persons likely to be affected by the winding-up, such as the company and shareholders. As regards creditors, more importance attaches to the view of unsecured creditors.

[2] Whilst the bank was a major creditor, it had not appeared to oppose the petition; instead, the receiver and manager had sworn an affidavit to oppose the petition. In doing so, the court must take him as representing the company and no one else as the instrument of appointment made it clear that he shall be the agent of the company. The result was that this was a petition in which no other creditor had come forward to oppose the same and the only opposition came from the company itself.

[3] There was insufficient material placed before the court to enable it to consider the exercise of its discretion in favour of the company. The debt had not been disputed and no attempt was made to show that the company was not insolvent. In these circumstances, the foremost consideration must be the interest of the unsecured creditors whose view must prevail over that of the company or its shareholders.

[4] If good reasons are made out for opposing a petition, it is incumbent on the petitioner to show special circumstances for the making of a winding-up order. Before any such onus passes to a petitioner, there must first be good reasons shown. None had been found here and so the petitioner faced no such task.

[Company ordered to be wound up.]

Case(s) referred to:

Cetico Sdn Bhd v. The Tropical Veneer Co Bhd [1987] 1 CLJ 170 ***(refd)***
Datuk Mohd Sari Datuk Hj Nuar v. Idris Hydraulics [1996] 3 CLJ 877 ***(refd)***
Kim Wah Theatre Sdn Bhd v. Fuhlum Development Sdn Bhd [1990] 2 MLJ 511 ***(refd)***
Re Crigglestone Coal Co Ltd [1906] 2 Ch 327 ***(refd)***
Re Great Eastern Hotel (Pte) Ltd [1989] 1 MLJ 161 ***(refd)***
Re London & Paris Banking Corp [1874] LR 19 Eq 444 ***(refd)***
Re P & J Macrae Ltd [1961] 1 All ER 302 ***(refd)***
Securicor (M) Sdn Bhd v. Universal Cars Sdn Bhd [1988] 1 MLJ 84 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1992] 1 CLJ 637 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(2)(a), 221
Companies Winding-up Rules 1972, r. 28

Other source(s) referred to;
The Law of Company Liquidation, JO' Donovan, 3rd edn, p 61

For the petitioner - HW Wong; M/s Wong Hai Wai & Assoc
For the respondent - Ng Sai Yeang; M/s Raja, Darryl & Loh
For the official receiver - D Gunasegaran (Yacob Shafei with him)

Reported by Cindy Chan

JUDGMENT

Clement Skinner JC:

This is the hearing of a petition presented for the winding-up of WWL Corrugators Sdn. Bhd., (hereafter the company) under s. 218 of the Companies Act 1965 (hereafter the Act) at the instance of Genting Sanyen Industrial Paper Sdn. Bhd. (hereafter the petitioner) on the grounds that the company being unable to pay its debts, it is just and equitable that it should be wound-up.

Prior to the presentation of this petition, the petitioner had by letter made demand, twice, to the company for payment of a sum of RM797,924.12 in accordance with the provisions of s. 218(2)(a) of the Act. The first request was made on 5 May 1998 and the second on 12 June 1998. No payment having been received from the company, this petition was presented on 1 August 1998. Due notice has been given to all concerned of the presentation of this petition by publishing such fact in the New Straits Times as well as the Star newspaper on 5 October 1998; and in the Government Gazette of 22 October 1998.

Only the company has given notice of its intention to appear for the purpose of opposing the petition. No creditor of the company has done so. This does not mean however that there are no other creditors to the company because there is a major creditor in the person of BSN Commercial Bank (M) Berhad (hereafter the bank) in whose favour the company had on 12 February 1996 executed a debenture by way of a fixed and floating charge over all its present and future assets as security for banking facilities of RM3.7 million granted to the company.

Some two months after the presentation of this petition, the bank on 12 October 1998, in exercise of its rights under the debenture, appointed one Lim Tian Huat (hereafter the receiver and manager) as the receiver and manager of all the assets and business of the company. The instrument of appointment states that the receiver and manager shall be the agent of the company.

Before me, counsel for the petitioner submitted that the consequence in law of the company neglecting to comply with the statutory demand for payment pursuant to s. 218(2)(a) of the Act is that a presumption of insolvency has arisen and unless the company can show that it is able to pay its debts, a winding-up order should be made. In support, counsel referred to the case of *Sri Hartamas Development Sdn. Bhd. v. MBf Finance Bhd.* [1992] 2 MLJ 313 where Gunn Chit Tuan SCJ (as he then was) speaking for the Supreme Court said at p. 320:

> ... the presumption of insolvency arises when the requirements of s. 218(2)(a) of the Act have been satisfied and it is for the company to prove it is able to pay its debts.

I should point out however that the presumption of insolvency is a rebutable one (see *Securicor (M) Sdn. Bhd. v. Universal Cars Sdn. Bhd.* [1988] 1 MLJ 84).

Learned counsel for the company concedes that a presumption of insolvency has arisen against the company but submits that although it is suggested that a winding-up order follows as a matter of course, a reading of ss. 218 and 221 of the Act shows that on the hearing of a petition, a winding-up court is vested with a discretion to make a variety of orders including to dismiss a petition and that in this case, for the reasons hereafter stated, discretion should be exercised in favour of the company and the petition either dismissed or alternatively suspended until such time as the receivership is not beneficial to all creditors or is uplifted.

The submission that there is an overiding discretion reposed in the court is well supported by authority because whilst it is accepted that as between a creditor and a company as his debtor, the creditor who proves insolvency is *prima facie* entitled to a winding-up order, (see the judgment of Buckley J at p. 331 in *Re Crigglestone Coal Co. Ltd.* [1906] 2 Ch 327) there are numerous cases, both local and Commonwealth, in which the overiding discretion of the court to refuse a winding-up is recognised, (see *Kim Wah Theatre Sdn. Bhd. v. Fuhlum Development Sdn. Bhd.* [1990] 2 MLJ 511; *Cetico Sdn. Bhd. v. The Tropical Veneer Co. Bhd.* [1987] 1 CLJ 170; [1988] 2 MLJ 665; *Re P & J Macrae Ltd.* [1961] 1 All ER 302).

However, as counsel for the petitioner correctly points out, the overriding discretion of the court, like any other judicial discretion, is fairly strictly regulated and is exercised in accordance with principles that are well defined. Counsel referred to *The Law of Company Liquidation*, 3rd edn by J.O' Donovan at p. 61 where the author discusses the discretion of the court in these terms:

Its power to refuse an order is, however, fairly strictly regulated and is exercised in accordance with principles that are relatively well defined. There are, in fact, certainly no more than five, and probably only four, reasons which will justify the court in refusing to make an order on the application of an unpaid creditor. These are (1) the applicant's debt amounts to less than $1,000; (2) the debt is *bona fide* disputed by the company; (3) the company has paid or tendered payment of applicant's debt; (4) winding-up is opposed by other creditors; and (5) the company is in the process of being wound-up voluntarily.

To oppose the winding-up, the company has through the receiver and manager filed an affidavit affirmed on 29 April 1999 (encl. 13), in which he states the following reasons why it would not be just and equitable to order a winding-up:

(i) a winding-up would result in the company ceasing to be a going concern which would result in the company encountering tremendous difficulty in collecting various trade debts owed to the company which amount to some RM1.5 million of which the company has arranged for RM500,000 to be paid to it over a one year period;

(ii) a winding-up would entail a forced and prompt disposal of the assets of the company, which are all secured in favour of the bank, without any opportunity to source potential and method of sale which will result in a greater shortfall to be suffered by the company its creditors and shareholders;

(iii) in the light of the receivership, there would be no prejudice to the petitioner if this petition were struck out because the petitioner would not as an unsecured creditor stand to receive any realisation in priority to the bank who is owed in excess of RM4 million;

(iv) if the petition is struck out, the assets of the company would continue to be received and managed in the interest of the company as a whole and the receiver and manager would ascertain if the company is able, *inter alia,* to be taken over or sold off as a going concern;

(v) notwithstanding the apparent insolvent position of the company, the petition is a stigma against the company and its assets and would hinder the course of the receivership for the realisation of its assets.

Based on what is stated in the affidavit of the receiver and manager, counsel for the company submitted that there can be no possible benefit to the petitioner, who is an unsecured creditor, to persist in seeking a winding-up order since the bank will take the first bite in any realisation whereas as matters now stand, a receiver and manager has already been appointed and he has said that the bank's security can be far better realised as a going

concern whereas the appointment of a liquidator on a winding-up order being made would not result in any benefit to the company or to its creditors but instead result in paralysis to the company and impair the realisation of the bank's security.

It was also submitted, on the authority of *Re P & J Macrae Ltd. (supra)*, that as there is opposition to the winding-up and since good reasons have been given for such opposition, the petitioner must show special circumstances to warrant the making of a winding-up order.

Before considering these contentions, useful reference may again be had to *The Law of Company Liquidation,* 3rd edn by J.O' Donovan where the author discusses opposition to a winding-up.

At p. 71 it is stated:

> Opposition to winding-up may proceed from the applicant's fellow creditors, who may be secured or unsecured, or from the company or (what is virtually the same thing) from the shareholders. The significance of opposition to winding-up varies in direct proportion to the relative importance of the opposing interest involved. Where the company is insolvent the foremost consideration naturally is the interests of the creditors, and these prevail over the interest of other persons likely to be affected by the winding-up, such as the company and shareholders. As regards creditors, more importance attaches to the view of unsecured creditors for the obvious reason that, unlike the secured creditors, they have no means other than winding-up by which they can obtain payment of their debts ... (and at page 72). The way in which the Court's discretion is affected, if at all, by opposition to the winding-up order, varies according to whether the opposition proceeds from (1) the company; (2) a different class of creditors from that to which the applicant is member; and (3) a majority of creditors of the same class as the applicant.

With regard to opposition to winding-up by the company, this is what the author states at p. 72:

> Where the application is filed by a creditor and is opposed only by the company, or by shareholders, the applicant is entitled *ex debito justitiae* to a winding-up order and it is doubtful whether the court has any power to refuse the order. This, at any rate, is the position where there is only one creditor who has received no offer of payment prior to hearing of the application.

It is obvious from the above passages, that the discretion of the court is affected by where the opposition is coming from and who the opposer is and whether he is a secured or unsecured creditor and whether he belongs to a class and if so whether he represents the majority or minority view.

Reverting to the facts of our case, the position that prevails is that whilst the bank is a major creditor, it has not appeared to oppose the petition; instead, the receiver and manager has sworn an affidavit to oppose the petition. In so doing, I must take him as representing the company and that the views that he puts forward are those of the company and no one else. I say so for the following reasons: the instrument of appointment makes it clear that he shall be the agent of the company; his affidavit does not say that he represents the bank; counsel who appeared did so on behalf of the company; it would be wrong and contrary to r. 28 of the Companies Winding-up Rules 1972 to allow the receiver and manager to speak for creditors who could but have not appeared. The result then is that this is a petition in which no other creditor has come forward to oppose the same and that the only opposition comes from the company itself.

In so opposing the petition, it would have been open to the company to rebut the presumption of insolvency by showing for example that the debt is genuinely disputed on substantial grounds (see *Re London and Paris Banking Corp* [1874] LR 19 Eq 444 p. 446) or demonstrating that it is not insolvent by applying either the 'quick assets test' where evidence is placed before the court of what its current assets are against its current liabilities to ascertain whether there is a deficiency (see *Re Great Eastern Hotel (Pte) Ltd.* [1989] 1 MLJ 161) or by applying the 'overall assets and liabilities test' where the court looks at all the assets of a company against all its liabilities to determine its ability to pay its debts (see *Datuk Mohd. Sari b. Datuk Hj. Nuar v. Idris Hydraulics* [1996] 3 CLJ 877; [1997] 5 MLJ 377). The company has not done any such thing but instead confines itself to the grounds stated in the receiver and manager's affidavit.

Eloquent though the submissions of counsel for the company have been, at the end of the day I ask myself whether the grounds relied upon are sufficient in law to defeat the *prima facie* right of an unsecured creditor to the remedy which exists primarily for its benefit? Having given the matter considerable thought, I have come to the conclusion that they do not and I say so for the following reasons. As I had earlier stated, the only opposition proceeds from the company itself but the debt has not been disputed and no attempt has been made to show that the company is not insolvent. In these circumstances, the foremost consideration must be the interest of the creditors; and in this case only one creditor is before the court and an unsecured creditor at that, whose views must prevail over that of the company or its shareholders. I also find that in the final analysis, the arguments put forward by the company are not really arguments for the benefit of the creditors or the company or its shareholders but are directed at preventing an impairment of the security of the bank or to facilitate the bank maximising recovery on its security and to

that extent I can give very little weight, if at all, to the submissions because in the first place, it does not lie in the mouth of the receiver and manager to espouse the cause of creditors who are not before the court and secondly, it would be unjust to deprive an unsecured creditor of his statutory remedy so as to facilitate the bank who in giving the loan, must be taken as having bargained to take the security it has as its protection against loss in the event of a winding-up (see *In Re Crigglestone Coal Co.* [1906] 2 Ch 327). I would also point out that in the case of *Re Crigglestone Coal* the company there, like here, in opposing the petition argued that a winding-up would not benefit the petitioning creditor since the debenture holders stood first in line to be paid from a realisation of assets. It was held by Buckley J at p. 334 of that case that as between the petitioner and the company, it is no answer to a petition to say that the debenture holders will or may sweep away all the assets.

In addition to the above, I also find that insufficient material had been placed before me to enable me to meaningfully consider the exercise of discretion in favour of the company. Whilst it was urged upon me that a forced sale of the assets may deprive the company of realising their best potential and that striking out the petition would afford the receiver and manager an opportunity to collect the receivables, continue trading and even to consider whether the company can be sold off as a going concern, no evidence was placed before the court as to what the assets of the company consist of and what their values or potential values are and why it would be best that they be sold later than sooner. Similarly, no attempt was made to show whether if allowed to, there are good prospects of the company being able to trade out of its difficulties or whether there are outstanding commitments or contracts which make the company an attractive proposition to be sold off as a going concern in which event it would be desirable to at least postpone any winding-up.

Before concluding, I wish to deal with the submission of counsel for the company based on the case of *Re P & J Macrae Ltd. (supra)*, that if good reasons are made out for opposing a petition, it is incumbent on the petitioner to show special circumstances for the making of a winding-up order. To me, it is implicit in that proposition that before any such onus passes to a petitioner there must first be good reasons shown. I have found none here and so the petitioner faces no such task. I should also state that in the course of her submissions for the company, counsel cited several authorities in support of her case. Without meaning any disrespect, I have not set out here all the arguments raised on those authorities because I found almost all were cases in which opposition to the petition came from creditors who had appeared to oppose the petition, the cases were distinguishable on their facts and consequently did not advance the case for the company.

In the result, for the reasons already given above, I find no just reason to deprive the petitioner of the order it seeks. I accordingly order that the company be wound-up.